

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

DOMINIQUE HOUSTON,

Plaintiff,

v.

OFFICER ROBERTS, *et al.*,

Defendants.

Case No. 3:19-cv-00758-MMD-CSD

ORDER

I. SUMMARY

In this case, brought under 42 U.S.C. § 1983, the Court permitted *pro se* Plaintiff Dominique Houston to proceed on his warrantless search claims based on the Fourth Amendment and Art. 1 Section 18 of the Nevada Constitution against Defendants Scott Roberts and Allison Jenkins-Kleidosty. (ECF No. 23 at 5-6.¹) Defendants have moved for summary judgment on the claims (“Motion”). (ECF No. 33.) The Court will grant the Motion as to the Fourth Amendment claim because it was not clearly established in November 2018 that requesting a single locational ping of a suspect’s cell phone from their cellular service provider required a warrant under the Fourth Amendment. The Court declines to exercise supplemental jurisdiction over Houston’s Nevada constitutional claim.

II. BACKGROUND

The following facts are undisputed.²

Following an initial investigation, officers of the Reno Police Department suspected that the perpetrator of a recent robbery was Plaintiff Dominique Houston. (ECF No. 33 at

¹ It appears that the conclusion of the order erroneously omitted reference to the corollary Nevada constitutional claim.

²Houston did not respond to the Motion, and his allegations in the complaint are minimal. (ECF No. 18.)

2.) Investigators sought to locate Houston, but his listed local address did not exist. (*Id.*) Among several other methods employed to find Houston, Officer Scott Roberts requested that AT&T, Houston's cell service provider, perform a single locational "ping" to obtain his real-time cell-site location information ("CSLI").³ (*Id.*; ECF No. 18 at 3.) The ping identified the location of Houston's phone as 2401 Harvard Way, Apartment 162. (ECF No. 33 at 2.) With this and additional information obtained through further investigation, Officer Allison Jenkins-Kleidosty applied for and obtained a warrant to search Apartment 162. (*Id.*; ECF Nos. 33-1 at 10, 18 at 4.)

The state charged Houston in Nevada's Second Judicial District Court with use of a deadly weapon, battery with the use of a deadly weapon, two counts of burglary, and fraudulent use of a debit or credit card. (ECF Nos. 33 at 3, 33-2 at 3-4.) Houston moved to suppress the single positional ping of his cell phone, as well as evidence obtained with the search warrant granted as a result of that ping, on the grounds that the ping was a warrantless search in violation of the Fourth Amendment. (ECF Nos. 33 at 3, 33-2 at 2-4.) The district court concluded that the ping constituted a 'search' but denied Houston's motion to suppress. (ECF Nos. 33 at 3, 33-2 at 14.) The case proceeded to trial, and Houston was convicted of robbery, both burglary counts, and credit card fraud. (ECF Nos. 33 at 3, 33-3 at 5.)

Houston appealed his conviction to the Nevada Court of Appeals. (ECF Nos. 33 at 3, 33-3 at 5.) The Court of Appeals upheld the district court's determination that the ping of Houston's phone was a search requiring a warrant under the Fourth Amendment⁴ and still found that, even setting aside "all the evidence obtained from the ping and search

³As noted in the magistrate judge's screening order on Houston's amended complaint, Houston does not expressly state whether Officer Roberts requested his historical or real-time CSLI, but this is the undisputed version of the facts presented in the Motion. (ECF Nos. 23 at 5, 33 at 2.)

⁴The Court of Appeals limited its holding to the case at issue given the limited briefing on the topic.

1 warrant, there remain[ed] overwhelming evidence to support Houston's conviction." (ECF
2 Nos. 33 at 4, 33-3 at 13.)

3 On December 20, 2019, Houston filed this lawsuit against AT&T, former AT&T
4 Chairman and CEO Randall Stephenson, the Reno Police Department, and Officer Scott
5 Roberts of the Reno Police Department. (ECF No. 1-1 at 2.) The Court dismissed with
6 prejudice Houston's claims against AT&T, Stephenson, and the Reno Police Department⁵
7 but dismissed Houston's Fourth Amendment claim against Officer Roberts with leave to
8 amend. (ECF Nos. 3, 19.) Houston amended his complaint to allege that Defendants,
9 Officers Roberts and Jenkins-Kleidosty, had violated his Fourth Amendment rights and
10 his rights under Art. 1 Section 18 of the Nevada Constitution by pinging his cell phone
11 without a warrant. (ECF No. 18 at 2-4.) Defendants filed this Motion on July 17, 2023.
12 (ECF No. 33.)

13 **III. DISCUSSION**

14 **A. Fourth Amendment Warrantless Search**

15 In Houston's amended complaint, he alleges that Roberts requested AT&T to
16 perform a locational ping on his cell phone without a warrant in violation of the Fourth
17 Amendment and that Jenkins-Kleidosty then used the pinged address to obtain a search
18 warrant for 2401 Harvard Way, Apartment 162. (ECF No. 18 at 4.) In the Motion,
19 Defendants argue that they are entitled to qualified immunity, Houston cannot prove that
20 Defendants' requested cell phone ping caused either the search of his apartment or his
21 conviction, and Houston's failure to respond to Defendants' requests for admission
22 constitute his concession that no constitutional violation occurred. (ECF No. 33 at 6-8.)
23 Houston does not meaningfully contest the facts that Defendants articulated in the Motion.
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28 ⁵The Court granted Houston leave to amend his claims against the Reno Police Department so long as those amendments were consistent with Judge Cobb's report and recommendation (ECF Nos. 3, 19), but he did not do so.

1 (*Id.* at 2-5; ECF No. 18.) Given the undisputed facts of this case and applicable precedent,
2 Defendants are entitled to qualified immunity.

3 “In determining whether a state official is entitled to qualified immunity in the
4 context of summary judgment, [courts] consider (1) whether the evidence viewed in the
5 light most favorable to the plaintiff is sufficient to show a violation of a constitutional right
6 and (2) whether that right was clearly established at the time of the violation.” *Sandoval*
7 *v. Cnty. of San Diego*, 985 F.3d 657, 671 (9th Cir. 2021), *cert. denied sub nom. San Diego*
8 *Cnty. v. Sandoval*, 142 S.Ct. 711 (2021) (citation and quotation marks omitted). District
9 judges may exercise their discretion in deciding which qualified immunity prong to
10 address first based on the circumstances of the case at issue. *See Pearson v. Callahan*,
11 555 U.S. 223, 236 (2009). The Court discusses, and decides this case based upon, only
12 the ‘clearly established’ prong of the qualified immunity test.

13 To overcome a claim of qualified immunity, Houston must show that the law
14 regarding his allegedly violated constitutional right was clearly established when
15 Defendants requested the ping of his phone. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735
16 (2011). For a government official’s conduct to have violated clearly established law, the
17 “rule’s contours must [have been] so well defined that it [was] clear to a reasonable officer
18 that his conduct was unlawful in the situation he confronted.” *City of Tahlequah v. Bond*,
19 142 S.Ct. 9, 11 (2021) (citation and quotation marks omitted). This means the
20 constitutional question must have been placed “beyond debate,” *Ashcroft*, 562 U.S. 731
21 at 741, by either a controlling authority or a “robust consensus of cases of persuasive
22 authority,” *Tuuamalemallo v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019) (citation omitted).
23 If existing precedent does not address the exact circumstances at issue, the plaintiff must
24 instead identify precedent holding certain conduct unconstitutional “under facts not
25 distinguishable in a fair way from the facts presented in the case at hand.” *Orn v. City of*
26 *Tacoma*, 949 F.3d 1167, 1178 (9th Cir. 2020) (quotation marks omitted).

27 As of November 2018, there was no controlling precedent, nor was there a robust
28 consensus of persuasive authority, that individuals have a reasonable expectation of

1 privacy in their real-time CSLI and thus that government officials must obtain a warrant
2 before requesting cell phone pings. See *United States v. Green*, 981 F.3d 945, 957-58
3 (11th Cir. 2020) (“The question of whether acquiring [real-time tracking data] constitutes
4 a search was unanswered in 2013 and remains unanswered today.”). Houston cites
5 *Carpenter v. United States*, 138 S. Ct. 2206 (2018), in an effort to establish that accessing
6 his CSLI constituted a search requiring a warrant under the Fourth Amendment. (ECF
7 No. 1-1 at 4.) Though the Supreme Court in *Carpenter* did find that there is a Fourth
8 Amendment right to privacy in *historical* CSLI, the majority opinion expressly left open the
9 question of whether that same conclusion could be reached about *real-time* CSLI. See
10 138 S. Ct. at 2220.

11 The screening order of Houston’s amended complaint notes that Houston failed to
12 clarify in his complaint whether Officer Roberts requested his historical or real-time CSLI.
13 (ECF No. 23 at 5; see also ECF No. 18 at 3-4.) But the Court finds that, though the facts
14 must be construed in the light most favorable to Houston as the non-moving party, the
15 only “rational” or “reasonable” reading of the operative complaint given the undisputed
16 facts in the record is that Roberts requested only Houston’s real-time CSLI. (ECF Nos.
17 33 at 2-3 (making unopposed assertions that Roberts only requested one ping for real-
18 time CSLI), 33-2 at 3 (stating the Second Judicial District Court of Nevada’s
19 understanding that Houston’s motion to suppress related to the acquisition of real-time
20 CSLI from his phone), 33-3 at 3 (stating the Nevada Court of Appeals’ understanding that
21 Officer Roberts requested for AT&T to locate Houston’s phone using “prospective” CSLI).)
22 See also *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th
23 Cir. 1987). *Carpenter*, accordingly, does not control here.

24 And this Court’s independent research did not suggest that other cases had clearly
25 established that real-time CSLI pings constitute Fourth Amendment searches at the time.
26 Indeed, only a few pre-November 2018 cases had discussed privacy interests in the real-
27 time short-term tracking of cell phones, and almost all of them are based on facts
28 “distinguishable in a fair way” from Houston’s allegations because they involved cell site

1 simulators rather than requests for real-time CSLI from cell service providers. *Orn*, 949
 2 F.3d at 1178; *see, e.g., State v. Andrews*, 134 A.3d 324, 349 (Md. 2016); *United States*
 3 *v. Lambis*, 197 F. Supp. 3d 606, 610 (S.D.N.Y. 2016); *United States v. Ellis*, 270 F. Supp.
 4 3d 1134, 1141, 1145-46 (N.D. Cal. 2017).

5 Houston additionally cites to *United States v. Katzin*, 732 F.3d 187 (3d Cir. 2013),
 6 as evidence that Defendants' requested ping of his phone violated the Fourth
 7 Amendment. (ECF No. 1-1 at 4.) But any holdings in that opinion which may have
 8 bolstered Houston's arguments were vacated when the Third Circuit granted rehearing
 9 *en banc*. *See United States v. Katzin*, Case No. 12-2548, 2013 WL 7033666, at *1 (3d
 10 Cir. Dec. 12, 2013). Rehearing was granted only on the issue of whether evidence should
 11 be shielded from suppression under the good faith exception to the exclusionary rule, and
 12 in determining whether this exception applied, the court declined to decide whether GPS
 13 tracking of a suspect's van constituted an unreasonable search. *See United States v.*
 14 *Katzin*, 769 F.3d 163, 169-70 (3d Cir. 2014) (en banc). As a result, *Katzin* cannot support
 15 the contention that Houston's alleged Fourth Amendment right was clearly established.

16 Considering the state of the law in November 2018, the Court concludes that it was
 17 not clearly established that requesting a single ping to obtain a suspect's real-time CSLI
 18 constituted a search requiring a warrant under the Fourth Amendment. Defendants have
 19 therefore shown that they are entitled to qualified immunity to Houston's Fourth
 20 Amendment warrantless search claim.

21 The Court will thus grant the Motion (ECF No. 33) as to Houston's Fourth
 22 Amendment claim.

23 **B. Nevada Constitution Article I, Section 18 Warrantless Search**

24 Having dismissed Houston's Fourth Amendment claim, the Court no longer has
 25 original jurisdiction over any claim and declines to exercise supplemental jurisdiction over
 26 Houston's remaining claim Nevada constitutional claim. *See* 28 U.S.C. § 1367(c)(3)
 27 ("[D]istrict courts may decline to exercise supplemental jurisdiction over a claim . . . if . . .
 28 the district court has dismissed all claims over which it has original jurisdiction.").

